

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

**SERVICES' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER TO
PREVENT CIRCUMVENTION OF DISCOVERY RULES WITH RESPECT TO DATA
IN THE POSSESSION OF THE MECHANICAL LICENSING COLLECTIVE**

The heart of the Copyright Owners' Opposition to the Services' Motion for Protective Order is the observation that non-parties may voluntarily provide their *own* information to litigants in a case. But the information at issue in the Services' Motion is *not* the MLC's *own* information. It is, instead, the *Services'* confidential information, which the MLC merely holds, subject to regulatory confidentiality obligations. Holders of a third party's confidential information are *not* free to hand that information over to litigants voluntarily, outside of properly served discovery requests or subpoenas.

The Copyright Owners' chief complaint is that the CRB's carefully crafted discovery rules will not give them easy, process-less access to the confidential Service information they want to build their direct case. The answer, however, is not to give the Copyright Owners a special advantage, allowing them to request that the MLC—which is controlled by music publishers and represented by the same law firm that represents the Copyright Owners here—voluntarily turn over Service information in response to their requests. Rather, the Board should require the Copyright Owners to use the well-established discovery mechanisms of preliminary

disclosure requests, written discovery requests, or subpoenas to seek the Services' confidential information either directly from the Services or from the MLC. Those same procedures would also apply to any efforts any Service may make to obtain confidential Copyright Owner information the MLC holds.

ARGUMENT

A. The CRB Has the Legal Authority to Grant the Services' Motion

Despite the Copyright Owners' contentions to the contrary, the CRB has broad power under 17 U.S.C. § 801(c) to "make *any* necessary procedural or evidentiary rulings in any proceeding under this chapter and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges." 17 U.S.C. § 801(c) (emphasis added); *see* Opp'n at 5. The Services have articulated in their Motion why a protective order is "necessary" to prevent the Copyright Owners from continuing to make an end-run around the CRB's well-established discovery rules. *See* 17 U.S.C. § 803(b)(6); 37 C.F.R. §§ 351.5(b), 351.9(e). The Copyright Owners have made clear they have every intention of continuing this practice, which the current Protective Order did not anticipate and does not address. *See* Dkt. No. 25482 (Protective Order). Indeed, while the Copyright Owners claim the Protective Order adequately protects confidential Service information that the MLC might disclose, there, in fact, is *nothing* in the Protective Order mentioning the MLC. The Protective Order also contains no provision guaranteeing that data produced by the MLC will receive the highest level of protection. Indeed, the MLC cannot enter into the Protective Order because it is statutorily barred from participating in this case. Nor have non-parties to this proceeding, whose data the MLC holds, agreed to the terms of the Protective Order. The Protective Order also does not resolve the lack of notice regarding the MLC's

disclosure of confidential Service information, or the inequity (discussed below) of allowing the MLC to decide who can access information submitted to the MLC.

B. The Services Are Not Seeking to Limit Information Gathering

The Services are not seeking to limit discovery, prohibit voluntary information gathering, or exclude relevant information from the record, as the Copyright Owners claim. *See* Opp’n at 5-6. To the contrary, the Services have agreed to a set of broad preliminary disclosures, some of which include confidential information that the Services have provided to the MLC. The Services are, however, trying to ensure the fair collection and production of confidential Service information and to prevent the very sort of “trial-by-ambush practices” the Judges have criticized in the past and that the Copyright Owners are advocating for here. *See* Opp’n at 6 (citing Order re Motion to Set Discovery Deadlines and to Compel, PSS/SDARS III, Dkt. No. 3699 (Aug. 23, 2016) at 9-12 (holding that the Judges have the discretion to enter rulings providing for preliminary disclosure and discovery); Order on IPG Motions for Modification, 2004-2009 CD and 1999-2009 SD (consolidated), Dkt. No. 20214 (Apr. 9, 2015) at 4 n.4). As the prior orders the Copyright Owners cite make clear, the preliminary discovery process—to which the Services have agreed—as well as formal discovery are the proper ways to go about “creating a full and accurate record” and that is what the Services seek to do here. Order re Motion to Set Discovery Deadlines and to Compel, PSS/SDARS III, Dkt. No. 3699 (Aug. 23, 2016) at 11.

C. The Copyright Owners are Seeking an Unfair Litigation Advantage

The Copyright Owners accuse the Services of having a “cynical endgame,” claiming that the Services are trying to “stonewall” the Copyright Owners by allowing them to access information from the MLC only to the extent obtainable through the CRB’s limited subpoena power. *See* Opp’n at 5, 9-11. This, however, misreads the Services’ Motion.

First, the Copyright Owners are free to seek confidential Service information *directly* from the Services through the normal course of preliminary and regular discovery—subpoenas are far from the only tool at their disposal. *See* Mot. at 1-2, 5.

Second, it is the Copyright Owners that are seeking an unfair litigation advantage, not the Services. On their view, it is the MLC, which, as noted above, is represented by the same law firm that represents the Copyright Owners,¹ that gets to decide which participant requests for the confidential information in its possession it will grant. And if the publisher-controlled MLC decides not to provide that information, the party requesting it must resort to subpoenas that the Copyright Owners otherwise deride as toothless. *See* Opp’n at 11 n.7. Worse yet, the Copyright Owners will be on immediate notice of any requests the Service participants make to the MLC. The Services, however, will have no notice of the Copyright Owners’ requests to the MLC or the opportunity to object. It is deeply concerning and highly inequitable for the Copyright Owners to be able to use their connection to the MLC to *secretly* obtain confidential Service information.

Lastly, it is disingenuous to suggest that the MLC providing confidential information to the Copyright Owners is equivalent to a non-party voluntarily providing information to a participant. *See* Opp’n at 5-6. This is because the MLC is not sharing its own information at its discretion, but rather the *Services’* confidential information.

D. The MMA Does Not Override CRB Discovery Requirements & Regulations

In arguing that the Services’ Motion contravenes the Music Modernization Act (“MMA”) and the governing regulations, the Copyright Owners nowhere acknowledge that they sought

¹ The dual representation is problematic because Pryor Cashman, by dint of their representation of the MLC, knows what confidential information the services have provided to the MLC, and therefore knows what to ask for. The fact that the confidentiality regulations apply to the DLC (*see* Opp’n at 3, 8) is irrelevant; the DLC does not possess confidential publisher information.

only a “limited exception” to the contemplated confidentiality regulations that would “allow disclosure of such information *in response to court orders, subpoenas or other legal processes.*”² And it is untrue—indeed, implausible—that the Digital Licensee Coordinator (“DLC”) proposed a regulation permitting *broad* dissemination of the Services’ confidential information than the publisher-controlled MLC itself had proposed. Nor is there any evidence from the rulemaking record that the Copyright Office intended to adopt such a broad exception under 37 C.F.R. § 210.34(c)(4)(iii), such that the MLC can provide counsel for a participant with confidential Service information without regard for the normal rules of discovery.³ The Copyright Owners’ reliance on the terms of the MMA is similarly misplaced. No provision of the Act creates this exception to the Copyright Office’s confidentiality regulations or alters the Copyright Royalty Board’s authority to control the conduct of its proceedings. *See* 17 U.S.C. § 115(d)(8)(A). To the contrary, the MMA directly recognizes that the “applicable statutory and regulatory provisions and rulings of the Copyright Royalty Judges” must play an important role. *Id.*

E. The Copyright Owners’ Proposed Stipulation Was Inadequate

Lastly, the Copyright Owners claim that they offered to stipulate “to *promptly* exchange copies of any information obtained from the MLC,” and that this would have given the Services “an equivalent result” to what the Services are seeking in the alternative in their Motion. Opp’n at 12, 14 (emphasis added). In reality, the Copyright Owners only offered to provide all other participants with data obtained from the MLC *within five business days of its receipt*. As

² MLC NOI Initial Comments at 30 (emphasis added), <https://www.regulations.gov/comment/COLC-2019-0002-0011>.

³ If there were any doubt about this question, the Board may wish to informally consult with the Copyright Office, which has been apprised of this issue. *See* 17 U.S.C. § 802(f)(1)(A)(i) (“[T]he Copyright Royalty Judges may consult with the Register of Copyrights on any matter other than a question of fact.”).

explained in the Services’ Motion, the Copyright Owners were unable to provide a legitimate reason for this one week or longer delay during the pre-filing meet and confer—and they have not attempted to provide one in their Opposition. *See* Mot. at 2 n.2. The stipulation the Copyright Owners’ offered, therefore, would not have been equivalent to the alternative relief the Services seek: simultaneous production of requested MLC data to all participants. The fact that the Copyright Owners have now rescinded their prior offer reveals the Copyright Owners’ one-sided and unfair view of the confidentiality regulations. If the Judges embrace that misguided view, the Copyright Owners would be able to make broad, unchecked requests of the MLC—all of which the MLC will surely voluntarily grant—and would then be free to cherry-pick what they do or do not share, while the Services will have no notice of what was requested or provided. In contrast, as discussed above, given Pryor Cashman’s overlapping representation of the MLC and the Copyright Owners, the Copyright Owners will be on immediate notice of any requests a participating Service makes to the MLC—which the MLC may not view as solicitously as the Copyright Owners’ requests.

CONCLUSION

For all the reasons discussed in the Motion and above, the Services respectfully request that the Judges prohibit the Copyright Owners from relying on 37 C.F.R. § 210.34(c)(4) to circumvent the standard rules of discovery and clarify that participants must seek information through preliminary discovery, written discovery, or by moving for a subpoena. In the alternative, if the Judges find that 37 C.F.R. § 210.34(c)(4) authorizes the participants to obtain confidential information from the MLC by request and without providing notice and an opportunity to object, the Judges should clarify that all “[a]ttorneys and other authorized agents of parties to proceedings before . . . the Copyright Royalty Judges” not only have the same rights to request and obtain the information, but that the MLC should produce the requested

information to all such “[a]ttorneys and other authorized agents” in the same proceeding. 37

C.F.R. § 210.34(c)(4)(iii).

DATED: September 7, 2021

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, September 07, 2021, I provided a true and correct copy of the Services' Reply in Support of Motion for Protective Order to Prevent Circumvention of Discovery Rules with Respect to Data in the Possession of the Mechanical Licensing Collective to the following:

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